CC Docket #96-98

TCG

EX PARTE OR LATE FILED

Teleport Communications Group
Regulatory & External Affairs
2 Lafayette Centre, Suite 400
1133 21st Street, N.W.
Washington, DC 20036
Tel: 202.739.0033
Fax: 202.739.0044

DOCKET FILE COPY ORIGINAL

October 2, 1997

RECEIVED

OCT - 2 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

RE: Notification of Written Ex Parte Communication: Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic - CCB/CPD 97-30

Dear Mr. Caton:

The attached letter regarding the above-referenced proceeding was delivered to Tom Boasberg of Chairman Hundt's office today. In this letter, TCG urges the Commission to provide clear guidance to the states in reviewing and enforcing ILEC-CLEC interconnection agreements as they relate to the handling of ISP-destined traffic.

An original and two copies of this letter are being submitted in accordance with Sec. 1.1206(b)(1) of the Commission's rules. Please include the attached document in the record of the above-referenced proceeding.

Thank you for your assistance in this matter.

Sincerely,

Judith Herrman

Judith E. Herrman
Manager, Federal Regulatory Affairs

cc: Tom Boasberg
Paul Gallant
Kathy Franco
Jim Casserly
A. Richard Metzger
Jim Schlichting

2

Ed Krachmer
Pat Donovan
Tom Power
John Nakahata
Richard Metzger (ALTS)
Richard Singer

DOCKET FILE COPY DUPLICATE

TCG

Robert C. Atkinson
Senior Vice President
Legal, Regulatory & External Affairs

Teleport Communications Group
Princeton Technology Center
429 Ridge Road
Dayton, NJ 08810
Tel: 908.392.2160
Fax: 908.392.3743
Email: atkinson@tcg.com

COPY

October 2, 1997

Ex Parte Communication

RECEIVED

OCT - 2 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Thomas Boasberg
Legal Advisor
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic - CCB/CPD 97-30*

Dear Mr. Boasberg:

The ALTS Petition is the result of a simple contract dispute: how should calls to Enhanced Service Providers (ESPs) such as Internet Service Providers be classified for purposes of ILEC to CLEC Interconnection Agreements?

In answering questions of contract interpretation, courts typically look to the intention of the parties and the common understanding and practices of the industry in which they operate. TCG believes (and has strong evidence) that both parties clearly understood and intended that ESP traffic would fall into the "Local Traffic" classification when they negotiated, and sometimes arbitrated, Interconnection Agreements. However, the ILECs have now, after the fact, invented a controversy to avoid the obligations under their agreements to pay money to their competitors. The ILEC claim is basically that ESP traffic cannot be "Local Traffic" (a defined term in the agreements) because, historically, the FCC has asserted jurisdiction over ESP traffic. The ILEC argument is that jurisdictionally interstate traffic cannot be "Local Traffic" as defined by the agreements, regardless of what the parties to the agreements intended and agreed to.

We believe that the ILEC's are simply wrong: we believe that the regulatory jurisdiction of traffic has nothing to do with how it is classified for purposes of applying an agreement which, by its own terms, determines how traffic is to be classified.

The Eighth Circuit has said that State commissions are responsible for interpreting and enforcing Interconnection Agreements.[1] That means the State commissions must interpret the terms of the agreements, determine the intentions of the parties, and require appropriate compliance and performance. The FCC therefore can't rule on what the contracts themselves mean. But it is the FCC's prior orders on ESP traffic that have been used by the ILECs to create the controversy -- to claim that FCC decisions somehow determine the classification of ESP calls for purposes of the Interconnection Agreements. If it is the FCC's prior orders that have been used to create this controversy, then an FCC order can help to end it.

It would be appropriate and helpful for the FCC to provide guidance on what its previous orders mean and how they should be interpreted. A declaration, by the expert telecommunications agency that authored the decisions, would provide sound and reliable evidence for the State commissions to consider when faced with the question about the meaning of a term of art used in the telecommunications industry.

In essence, the ILECs are exploiting a gap in the FCC's rulings on ESP traffic. The FCC has directly addressed what appeared to it to be all the issues associated with ESP calling. The Commission has consistently declared that an ESP can use a local exchange service to collect and distribute enhanced services and that end users's connections to ESPs should be charged at ordinary local telephone rates under local tariffs. Significantly, the Commission declared that calls to ESPs should be classified by ILECs as "local traffic" (the very term used in the Interconnection Agreements) for purposes of separations.[2] The FCC therefore probably presumed it had covered all the bases in its orders -- it covered the relationship between ESPs and ILECs, between ILECs and end users, and between ESP traffic and ILEC cost accounting. The one issue that the Commission did not address explicitly -- because no one asked -- was the treatment of ESP traffic when it is handled by two LECs.

---

[1]The Court found that "state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252." *See Iowa Utilities Board v. FCC*, Case No. 96-3321, (8th Cir.) slip op. at 122 (July 18, 1997).

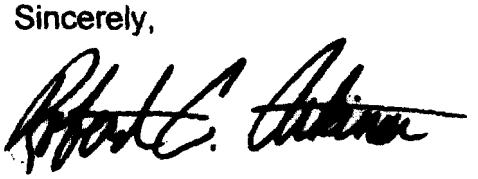
[2] "ESP traffic over local business lines is *classified as local traffic* for separations purposes [47 C.F.R. Section 36.125] with the result that TS costs associated with ESP traffic are apportioned to the intrastate jurisdiction, and are recovered through intrastate charges paid by ESPs and other purchasers of intrastate services." Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983 (1989) (emphasis added).

The FCC was not called upon to address this issue directly because it had no reason to expect that there would be any question. It had every reason to expect that ESP calls handled by two adjacent ILECs that are rated as "local" calls under the ILECs' local exchange service tariffs would be treated as such for purposes of the interconnection arrangements (including compensation) between the ILECs. And in fact that is, to the best of TCG's understanding, exactly what has happened in the roughly fifteen years since the FCC adopted its earliest ESP ruling. For example, local telephone calls from Bell Atlantic subscribers to an ESP served by an adjacent GTE exchange are treated by the ILECs in precisely the same way, for purposes of interconnection arrangements, that calls from the same subscriber to a dentist or hardware store served by the same GTE central office are treated -- as local traffic.

So, all that the Commission needs to do here is to make clear that the FCC has always intended that ESP calls should be treated as local traffic for **all** purposes. It should note that the practice in the industry has always been to treat ESP traffic as "local" for **every** purpose, including reciprocal compensation between LECs, and that the FCC would not, therefore, disagree with State commission findings that the parties to the CLEC-ILEC Interconnection Agreements incorporated this industry understanding and practice into their agreements. The Commission can and should also note that the FCC never singled out ILEC-CLEC interconnections for different treatment of ESP traffic and such treatment -- as advocated by the ILECs -- was not something the FCC ever had in mind.

By clearing away the ILECs' "smokescreen" issue, the FCC will make it much easier and quicker for the State commissions to interpret and enforce the substantive provisions of the agreements and, hopefully, it would make the State commissions' decisions less susceptible to further "gaming" by the ILECs.

Sincerely,



cc: William Caton
Paul Gallant
Kathy Franco
Jim Casserly
A. Richard Metzger
Jim Schlichting

Ed Krachmer
Pat Donovan
Tom Power
John Nakahata
Richard Metzger (ALTS)
Richard Singer